UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

HARTMAN AND TYNER, INC. d/b/a
MARDI GRAS CASINO AND HOLLYWOOD
CONCESSIONS, INC.,

Respondent,

and CASE NO. 12-CA-072234, et. al

UNITE HERE! LOCAL 355,
affiliated with UNITE HERE!

Charging Party.
_____/

RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER

Hartman and Tyner, Inc. d/b/a Mardi Gras Casino and Hollywood Concessions, Inc. (hereinafter "Respondent", "Employer" or "Mardi Gras"), pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, hereby files its Exceptions to the Administrative Law Judge's Decision and Recommended Order in the above-captioned matter, which was issued on September 18, 2012.

On April 30, 2012, the National Labor Relations Board ("NRLB") issued its Order Consolidating Cases, Consolidated Complaint and Notice of Hearing.[1] The Consolidated Complaint alleged that Respondent violated Section 8(a)(1) and Section 8(a)(3) of the National Labor Relations Act (the "Act").

On June 25-28, 2012, a hearing was held before the Honorable George Carson III, Administrative Law Judge ("ALJ"), on the Consolidated Complaint. The

1. The Board was consolidating case numbers: case numbers: 12-CA-072234, 12-CA-072238, 12-CA-072245, 12-CA-072246, 12-CA-072248, 12-CA-072251, 12-CA-072254, 12-CA-072257, and 12-CA-072263.

Administrative Law Judge determined that the Respondent violated the Act in some respects, but not in others. Specifically, the ALJ found that the Company violated Section 8(a)(1) of the Act by threatening employees, "linking" the discharge of an employee to her protected activity, and interrogating employees regarding their union sympathies and the activities of other employees. In addition, the ALJ found that the Company violated Section 8(a)(3) by discharging Sochie Nnaemeka, James Walsh, Steven Wetstein, Dianese Jean, and Alicia Bradley, and suspending and discharging Theresa Daniels-Muse, Tashana McKenzie, and Amanda Hill. (ALJD p. 27, L. 11-15).[2] Thus, the ALJ recommended: (1) the imposition of a cease-and-desist order; (2) that Employer offer reinstatement to Ms. Nnaemeka, Mr. Walsh, Mr. Jean, Ms. Bradley, Ms. Daniels-Muse, Ms. McKenzie, Ms. Hill, and Mr. Wetstein; (3) that Employer make whole Ms. Nnaemeka, Mr. Walsh, Ms. Jean, Ms. Bradley, Ms. Daniels-Muse, Ms. McKenzie, Ms. Hill, and Mr. Wetstein; remove from its files any reference to the unlawful suspensions and discharges of these eight discharged employees; and notify these employees of same in writing; (4) that Employer preserve payroll records to determine amount of backpay under the terms of the ALJD; (5) that Employer notice posting requirements; and (6) that Employer file sworn certification with the Regional Director attesting to the steps that the Respondent has taken to comply. (ALJD p. 27, L. 47; p. 28, L. 1-48).

These Exceptions are filed to the Administrative Law Judge's findings with respect to the Company's actions and to the Recommended Order. Exceptions are

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2. As used herein, "ALJD" refers to the ALJ's Decision, and "p." and "L" refer to the page and line numbers of the ALJ's Decision. Cites to the transcript of the hearing before the ALJ will appear as (Tr. p. #).

taken to the following findings and conclusions:

1. To the finding that the Board has jurisdiction over the operations of Respondent. (ALJD, p.3, L. 11-12).

2. To the conclusion that there was any suggestion of animus towards the Union. (ALJD, p. 5, L. 18-20).

3. To the finding that "by interrogating an employee [Sochie Nnaemeka] with regard to her union sympathies the Respondent violated Section 8(a)(1) of the Act." (ALJD, p. 8, L. 39-40).

4. To the finding that "[b]y threatening employees with unspecified reprisals of their union activity, the Respondent violated Section 8(a)(1) of the Act." (ALJD, p. 9. L. 3-4).

5. To the finding that by "[t]hreatening off-duty employees with arrest, [and] a citation for trespassing, because they engaged in protected concerted union activity" Respondent violated Section 8(a)(1) of the Act. (ALJD, p. 9, L. 34-36).

6. To the finding that Mr. Adkins' meeting with Amanda Hill, after she was discharged, was coercive and independently violated Section 8(a)(1) of the Act. (*See* ALJD, p. 10, L. 1-3).

7. To the finding that "by interrogating employees regarding union sympathies and [the] activities of other employees" Respondent violated Section 8(a)(1) of the Act. (ALJD, p. 11, L. 38-39).

8. To the finding that "Respondent, by discharging Nnaemeka because of her union activity, violated Section 8(a)(3) of the Act." (ALJD, p. 14, L. 8-9).

9. To the ALJ's failure to consider all of the facts surrounding Ms.

Nnaemeka's discharge.

10. To the finding that "Respondent by discharging Walsh because of his union activity, violated Section 8(a)(3) of the Act." (ALJD, p. 18, L. 39-40).

11. To the finding that Sochie Nnaemeka and James Walsh were credible. (ALJD, p. 6, L. 26).

12. To the finding that "Respondent by discharging Wetstein because of his union activity, violated Section 8(a)(3) of the Act." (ALJD, p. 23, L. 4-5).

13. To the ALJ's failure to consider all of the facts surrounding Mr. Wetstein's discharge.

14. To the finding that "Respondent, by discharging, Dianese Jean, Alicia Bradley and suspending and discharging Theresa Daniels-Muse, Tashana McKenzie, and Amanda Hill because of their participation in protected concerted union activity violated Sections 8(a)(1) and (3) of the Act." (ALJD, p. 26, L. 50-52).

15. To the ALJ's failure to consider all of the facts surrounding the "delegations" on November 17 and 18, 2011, the subsequent suspension and discharge of Theresa Daniels-Muse, Tashana McKenzie and Amanda Hill, and the discharge of Dianese Jean and Alicia Bradley.

16. To the Recommended Order that Respondent, within 14 days of the Board's Order, offer Sochie Nnaemeka, James Walsh, Dianese Jean, Alicia Bradley, Theresa Daniels-Muse, Tashana McKenzie, Amanda Hill, and Steven Wetstein full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. (ALJD, p. 28, L. 21-25).

17. To the Recommended Order that Respondent make whole Sochie Nnaemeka, James Walsh, Dianese Jean, Alicia Bradley, Theresa Daniels-Muse, Tashana McKenzie, Amanda Hill, and Steven Wetstein. (ALJD, p. 28, L. 27-29).

18. To the Recommended Order that, within 14 days from the date of the Board's Order, Respondent "remove from its files any references to the unlawful suspensions and discharges of Theresa Daniels-Muse, Tashana McKenzie, and Amanda Hill, and the discharges of Sochie Nnaemeka, James Walsh, Dianese Jean, Alicia Bradley, and Steven Wetstein, and within 3 days thereafter, notify them in writing that this has been done and that the suspensions and discharges will not be used against them in again way." (ALJD, p. 28, L. 31-36).

19. To the Recommended Order that Respondent preserve, and within 14 days of a request, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, social security payment records, timecards, personal records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of the Order. (ALJD, p. 28, L. 38-43).

20. To the Recommended Order that Respondent, within 14 days after service by the Region, post at its facilities copies of the noticed marked "Appendix" which was attached to the ALJD. (ALJD, p. 28, L. 45-47).

21. To the ALJ's Conclusions of Law that Respondent violated Section 8(a)(1) and (3) of the Act. (ALJD, p. 27, L. 1-15).

22. To the ALJ's recommended remedies, as there were no unfair labor practices and there should be no remedies. (*See* ALJD, p. 27, L. 19-34).

BRIEF IN SUPPORT OF EXCEPTIONS

1. The ALJ Erred in Finding that the Board has Jurisdiction Over the Operations of Respondent

The ALJ erred in finding that the Board has jurisdiction over the operations of the Respondent. (ALJD, p. 3, L. 11). Although, as noted by the ALJ, the Board may assert jurisdiction over the Poker operations, Poker is only a small factor of the pari-mutuel activity taking place at Mardi Gras. (*See* ALJD, p. 2, L. 29-30). It is well established that the NLRB does not have jurisdiction over racetracks, dog tracks or pari-mutuel employees. *See* 29 C.F.R. § 103.3; *see also Florida Bd. Of Business Regulation, Division of Pari-Mutuel v. N.L.R.B.,* 688 F.2d 1362 (1982) (holding the Board's exercise of jurisdiction over jai-alai, pari-mutuel employees to be an abuse of discretion).

There are a number of factors used to determine whether the Board should assert jurisdiction over an employer. Yet, in his findings the ALJ incorrectly failed to consider all of these factors in determining that the Board should assert jurisdiction over Mardi Gras. For example, the ALJ did not consider that many employees at Mardi Gras are seasonal nor the high turnover rates at Mardi Gras. *See Delaware Racing Ass'n and United Food & Commercial Workers Union, Local 27, AFL-IO,* 325 NLRB No. 12 (1997). Although not addressed by the ALJ, these factors remain prominent at Mardi Gras. The number of employees employed by Respondent varies depending on whether or not it is racing season. (*See* Tr. p. 577). Additionally, Respondent has high turnover rates as demonstrated by its 75 involuntary terminations in 2011, in addition to normal attrition. (Tr. p. 765).

The ALJ also failed to consider whether the number of customers increased after Respondent added the Casino. In *Yonkers*, the number of customers increased greatly after the Casino was added. *See Yonkers Racing Corp. D/B/A Empire City at Yonkers Raceway,* 355 NLRB No. 35 *2 (2010) (the level of attendance rose exponentially from 354,000 customers a year to 4.5 million after the casino was added). Importantly, the General Counsel did not produce any evidence that the number of customers increased since the slot machines were added to Mardi Gras. Contrastingly, Respondent showed that, prior to adding the slot machines, Mardi Gras attracted large numbers of patrons. (*See* Tr. p. 33). Further, while the slot machines and Poker room are limited to patrons 21 years of age and older, the grandstand and other pari-mutuel areas can be accessed by customers of any age, including families. (Tr. p. 543-546). Additionally, the Board did not produce any evidence that the addition of the slot machines had any impact on Respondent's hours of operations.

There are a number of other crucial distinctions between this case and the cases relied on by the ALJ. For instance, while the number of employees at Mardi Gras doubled when the slot machines were installed, this increase does not compare to the growth in *Yonkers,* where the number of employees increased *six-fold.* (ALJD, p. 2, L. 31-32; *see Yonkers,* 355 NLRB * 2). Additionally, in *Yonkers* the revenues for the casino was more than *five* (5) times greater than that of the racetrack, as opposed to this case where it was only approximately two (2) times greater. (*See Yonkers,* at *1). Further, the ALJ misplaced his reliance on the pari-mutuel revenues report, as it is an incomplete depiction of Mardi Gras' pari-mutuel revenues. Specifically, the pari-mutuel revenues report does not reflect the entire year, and is also missing the revenue from

wagers placed by other facilities on Mardi Gras' signal. (Tr. p. 41, 48). The ALJ incorrectly stated that the Company's casino operations do not involve the racing industry. (ALJD, p. 3, L. 7). Unlike the cases relied on by the ALJ where the Casino overshadows the racetrack, there has been an overall resurgence in pari-mutuel activity at Mardi Gras. (Tr. p. 32, 597).

Moreover, there were a number of other factors that influenced the Board in *Yonkers* which are not present in this case. In *Yonkers,* a building was constructed *solely* for the new gaming operations, whereas in this case Respondent's facilities remained the same size and Respondent merely remodeled a portion of the facility to include the slot machines. (Tr. p. 26).

In sum, it is evident that the factors presented in this case are patently different than those presented in the cases relied on by the ALJ. Respondent has provided overwhelming evidence demonstrating that the pari-mutuel operations remain the driving force at Mardi Gras. Thus, Respondent remains primarily a pari-mutuel operation and the Board should not assert jurisdiction over it. *See Yonkers,* at *3 ("if the enterprise remains primarily a racetrack operation, the Board would not assert discretionary jurisdiction").

2. The ALJ Erred in Concluding that there was Anti-Union Animus by the Employer

The ALJ erred in finding that Employer harbored anti-union animus. (ALJD p. 17, L. 50-51). To begin with, Respondent signed a Memorandum of Agreement ("MOA" or "Neutrality Agreement") with the Union in 2004. (*See* Tr. p. 748; General Counsel's Ex. 13). From the time the MOA was in effect, until the charges that are the subject of this Complaint were filed, the Union never raised any complaints that Respondent had

violated the employees' Section 7 rights, despite ongoing Union activity throughout this time. (Tr. p. 749). Further, between the time of the filing of the unfair labor practices ("ULPs"), which form the basis of this case and the hearing, there have not been any new allegations that Respondent violated the Act. In his decision, the ALJ incorrectly inferred anti-union animus from what he characterizes as Mardi Gras' attempt to contest the validity of the MOA in a lawsuit. (ALJD, p. 5, L. 18-20). However, *Mulhall v. Unite Here 355,* 618 F.3d 1279 (11th Cir. 2010), cited by the ALJ in his decision, is a lawsuit which was filed by an employee of Mardi Gras **against** both the Union and Mardi Gras to enjoin enforcement of the MOA. Mardi Gras merely responded to the allegations of the lawsuit as a defendant. *Mulhall* clearly does **not** establish anti-union animus on behalf of the Employer.

Respondent, through Dan Adkins, manages two other gaming facilities that are unionized. (Tr. p. 744-745). Respondent has maintained a positive relationship, like a partnership, with both of these unions and has negotiated multiple collective bargaining agreements throughout the years with these unions without any strikes. In anticipation of the 10(j) hearing in Federal Court on this matter,[3] representatives for both of these Unions wrote letters of support for Dan Adkins and the Respondent. Specifically, Randall T. Moore, the Sub District Director for the United Steelworkers, authored a letter specifically directed to the question of whether Hartman and Tyner Inc., and/or Dan Adkins are anti-Union. (See Tr. p. 747; *See* Respondent's Ex. 30). Mr. Moore, who has been the staff representative for that Union and dealt with the company for the past twelve (12) years, writes "in my experience both Hartman and Tyner, Inc. and Dan

3. Attached hereto as Exhibit A is a copy of the order issued by Judge Zloch in that matter.

Adkins have always dealt with our Union as partners, and we have negotiated multiple contracts without strikes." (Respondent's Ex. 30). In addition, Respondent has had a twenty-plus-year relationship with Teamsters Local 337, at their operation in Hazel Park, Michigan, called Hazel Park Harness Raceway. (See Tr. p. 745). Lawrence Brennan, the President of Teamsters Local 337, also authored a letter indicating the positive relationship his Union has enjoyed with Hartman and Tyner, Inc. and Dan Adkins. (*See* Tr. p. 746). Mr. Brennan concludes his letter by stating, "In over 20 years, I have never heard or seen anything from Hartman and Tyner, Inc. or Dan Adkins that would even suggest that they would engage in any unlawful anti-union misconduct." (Respondent's Ex. 31). Contrary to the ALJ's conclusion, the letters do not simply show that "Adkins is a businessman and, when business demands that he deal with the union, he does so." (ALJD, p. 5, L. 28-29). These letters from the Teamsters Union and the United Steelworkers Union unequivocally show an ongoing partnership between these Unions and Respondent that far exceeds what is necessary for good business. (*See* ALJD p. 5, L. 23-29; *see* Respondent's Ex. 30 &31).

General Counsel's only effort to establish anti-union animus stems almost entirely from allegedly unlawful interrogations of employees by managers/supervisors. Nearly all of these alleged "interrogations" related to the home visits by the union, which, as noted by the ALJ, were often conducted by individuals who would not identify themselves as being from the Union. (*See* ALJD p. 6, L. 11-17). Any discussion relating to these home visits was a result of the Union's misrepresentations to Mardi Gras employees during these home visits. (Tr. p. 750). Thus, there is absolutely no support for the ALJ's finding of anti-union animus from the Employer.

3. The ALJ Erred in Finding that the Employer Engaged in any of the Alleged Section 8(a)(1) Violations

Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7 of the Act]." Thus, the employer may not intimidate or coerce employees with respect to protected activities. *Hanlon & Wilson Co. v. NLRB,* 738 F.2d 606 (1984). To prove an unfair labor practice, the General Counsel of the Board must meet its burden "upon preponderance of the testimony taken," and must establish its case by "substantial evidence." *Id.* at 610. "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established." *Id.* As is more fully demonstrated below, the ALJ incorrectly held that Employer engaged in any unfair labor practices in violation of Section 8(a)(1) of the Act. (ALJD, p. 27, L. 1-9).

a. The ALJ Erred in Finding that the Employer Interrogated Sochie Nnaemeka in violation of Section 8(a)(1) of the Act

The ALJ erred in finding that Bill Fodor interrogated Sochie Nnaemeka in violation of Section 8(a)(1) of the Act. (ALJD p. 8, L. 39-40). As a preliminary matter, the ALJ attributed the Employer's knowledge that the Union was organizing to a letter by Wendi Walsh to Mr. Adkins dated October 31, 2011. (ALJD p. 17, L. 49-50). However, the incident forming the basis of this allegation occurred on October 30, 2011, and, thus, this alleged knowledge cannot be attributed to Mr. Fodor. (*See* ALJD, p. 8, L. 1; ALJD, p.7, L. 45-48).

The ALJ erred in relying on Ms. Nnaemeka's claim that employee Ronald Schultz

informed Mr. Fodor that Ms. Nnaemeka had visited his house earlier that day, to show that Mr. Fodor had knowledge of Ms. Nnaemeka's alleged union activity. (ALJD, p. 8, L. 15-18). Against Respondent's objection, the ALJ allowed Ms. Nnaemeka's hearsay testimony regarding her conversation with Mr. Schultz, with the caveat that it would not be used to establish a Section 8(a)(1) violation. (Tr. p. 483-484). The decision, however, shows that the ALJ relied on this testimony in support of the Section 8(a)(1) violation. (ALD, p. 8, L. 11-26).

In addition, the ALJ incorrectly accepted Ms. Nnaemeka's testimony that Mr. Fodor called her into the supply closet and asked "if she had been 'visited by strangers at [her] house'" and "[S]o the Union has not come to your house? You're not with the Union?" (ALJD, p. 8, L. 4-9). In addition, the ALJ incorrectly concluded that Mr. Fodor did not deny having this conversation with Ms. Nnaemeka. (ALJD, p. 8, L. 28-29). Mr. Fodor vehemently denied having this conversation with Ms. Nnaemeka in the supply closet. (Tr. p. 676). Further, Mr. Fodor adamantly denied asking Ms. Nnaemeka "so the Union has not come to your house? You're not with the Union?". (Tr. p. 676). The only evidence presented by General Counsel in support of this allegation was Ms. Nnaemeka's self-serving testimony which is completely refuted by Mr. Fodor's own testimony. Furthermore, Mr. Fodor received extensive training at Mardi Gras, and Gulfstream Park (where he worked previously under a Neutrality Agreement), regarding what behavior is acceptable and what can and cannot be said to employees in situations where a Neutrality Agreement is in place, and Mr. Fodor believed that any conversations about the Union were "off-limits." Given his extensive training and experience, Ms. Nnaemeka's self-serving recollection is highly implausible and should

not have been given any weight. (*See* Tr. p. 677).

The ALJ's conclusion that these events occurred, based solely on the credibility of Ms. Nnaemeka, is unfounded. Ms. Nnaemeka not only *lied* about her education on her employment application to the Respondent, but also intentionally omitted from the Board, while preparing her affidavit in this case, that she was a salt or that she had lied on her employment application to Respondent. (Tr. p. 500). In light of the evidence stated above, it is clear that the ALJ erred in finding that Respondent violated Section 8(a)(1) of the Act by interrogating Ms. Nnaemeka.

b. The ALJ Erred in Finding that Employer Threatened Employees with Unspecified Reprisals in Violation of Section 8(a)(1) of the Act

The ALJ erred in finding that Supervisor Evans Etienne (who was no longer employed by Mardi Gras at the time of the hearing), threatened employees with unspecified reprisals if they engaged in union activities or protected concerted activities. (ALJD, p. 9, L. 3-4). In order for Employer's words to violate Section 8(a)(1), either the words themselves, or the context in which they are used, must suggest an element of coercion or interference. *Pioneer Natural Gas Co. v. NLRB,* 662 F.2d 408, 415 (5th Cir. 1980).

Ms. McKenzie's testimony, which is used to buttress the ALJ's conclusion, does not provide *any* indication that she felt threatened or coerced by Mr. Etienne's statements. (Tr. p. 364). In fact, Ms. McKenzie's own testimony shows Mr. Etienne was her friend and that he merely told her to "be careful and watch her back" as a friend looking after another friend. (Tr. p. 357-58). This statement could have easily been referring to any other employees that opposed the union, instead of Respondent. In response to Mr. Etienne's statement, Ms. McKenzie simply thanked him and walked

away. (Tr. p. 358). Absolutely **no** element of coercion or interference can be drawn from Mr. Etienne's statements to Ms. McKenzie, and, thus, these statements cannot be found to qualify as an unlawful threat in violation of Section 8(a)(1) of the Act.

c. The ALJ Erred in Finding that Employer Violated Section 8(a)(1) by Advising Off-Duty Employees that Failure to Leave the Premises Would Result in Their Arrest

The ALJ erred in finding that Security Manager Rich Hopke threatened employees with discharge and arrest in violation of Section 8(a)(1) of the Act. (ALJD, p. 9, L. 34-36). As the evidence shows, Mr. Hopke, as part of his duties, simply responded to the disruption caused by the large group that stormed the Casino on November 17 - 18, 2011. On November 18, 2011, after already having been warned not to return to Mardi Gras after the disruption that they caused on the previous day, a large group of individuals, including the off-duty employees, stormed the front entrance of Mardi Gras casino. (Tr. p. 753, 762). Mr. Hopke again asked the large group to remove themselves from the premises. After Mr. Hopke's request failed, he instructed Lead Organizer of the Union, Mike Hill, who was speaking on behalf of the group that the group needed to leave or he was going to "call the police." (Tr. p. 149, 178). Mr. Hill tauntingly told Mr. Hopke "go ahead and call the police." (Tr. p. 149).

In addressing the group, Mr. Hopke, as Chief of Security, was trying to maintain order, as is within an employer's rights. *See, e.g., Beverly,* 227 F.3d at 833 ("employers are entitled to maintain order and respect in the workplace."). The statements made by Mr. Hopke were directly related to his duties as Chief of Security, which included controlling and minimizing the group's disruption, and had nothing to do with the group's involvement in union activity. Accordingly, Mr. Hopke's statements should not have

been found to have violated Section 8(a)(1) of the Act.

d. The ALJ Erred in Finding that Dan Adkins Conversation with Amanda Hill on December 2, 2011, was Coercive and Violated Section 8(a)(1) of the Act

The ALJ erred in finding that Mr. Adkins' conversation with Amanda Hill on December 2, 2011, after she had already been discharged, violated Section 8(a)(1) of the Act. (ALJD p. 10, L. 1-3). On or about December 2, 2011, nearly two weeks after her termination from employment with Mardi Gras, Ms. Hill met with Mr. Adkins and Cathy Reside, Gaming Director. (Tr. p. 763). While Mr. Adkins did not deny most of Ms. Hill's testimony, his recollection of the meeting differed from that presented by Ms. Hill. (ALJD p. 9. L. 49-50; Tr. p. 763). In any event, during her meeting with Mr. Adkins, Ms. Hill asked why she had been terminated. (Tr. p. 763). In response to this question, Mr. Adkins informed Ms. Hill that she had been terminated because she had engaged in gross misconduct and disruptive behavior when she stormed the property with the large group on November 17, which was in violation of company policy. (Tr. p. 763).

Contrary to the ALJ's findings, Mr. Adkins **never** linked Ms. Hills discharge to her protected "peaceful activity." Instead he simply responded to her inquiry and provided the reasons for her termination. Accordingly, Mr. Adkins response to Ms. Hill's question as to why she had been terminated did not constitute a violation of Section 8(a)(1) of the Act.

e. The ALJ Erred in Finding that Employer Interrogated Employees in Violation of Section 8(a)(1) of the Act

It is well established that interrogation of an employee is not illegal *per se.* To determine whether questioning violates the Act, the Judge must consider "whether under all of the circumstances the interrogation reasonable tends to restrain, coerce, or

interfere with rights guaranteed by the Act." *Rossmore House,* 259 NLRB 1176 (1984), *aff'd sub nom. Hotel Employees & Restaurant Employees Union, Local 11 v. N.L.R.B.,* 760 F.2d 1006 (9th Cir. 1985); *see also Pioneer Natural Gas Co. v. NLRB,* 662 F.2d 408, 415 (5th Cir. 1980). To fall within the ambit of section 8(a)(1), either the words themselves, or the context in which they are used, must suggest an element of coercion or interference. *Pioneer,* 662 F.2d at 415. Further, there are factual scenarios where a supervisor may ask an employee, without violating Section 8(a)(1), about whether the employee has signed a union card and what benefits the union would provide to the employee. *See, e.g., Pioneer,* 662 F.2d at 415; *Broadway Motors Ford, Inc. v. NLRB,* 395 F.2d 337, 339 (8th Cir. 1968).

The ALJ correctly concluded that there was no coercive interrogation with regard to the union sympathies of Yvrose Jean Paul, and that there was no threat implied relating to Ms. Jean Paul's benefits. (ALJD, p. 11, L. 31-33). The ALJ, however, incorrectly infers that Facilities Director Tommy Grozier's questions to Ms. Jean Paul regarding the identity of the persons who had visited her home, was an inquiry into the sympathies and activities of other employees. (ALJD, p. 11, L. 35-37). There is absolutely no evidence that Mr. Grozier inquired about the union sympathies of other employees. Mr. Grozier simply inquired about the identities of the persons who had visited Ms. Jean Paul at her home, as there had been concerns of home visits by individuals who had identified themselves as being from Mardi Gras or the community. There is no indication that Mr. Grozier believed that the individuals claiming to be from Mardi Gras or the community were employees. Thus, the ALJ incorrectly found that Ms. Grozier interrogated employees regarding the union sympathies and activities of other

employees in violation of Section 8(a)(1) of the Act. (ALJD, p. 11, L. 38-39).

4. The ALJ Erred in Finding Sochie Nnaemeka and James Walsh Credible

The ALJ ignored the voluminous evidence that Ms. Nnaemeka and Mr. Walsh had little, if any, credibility. While the Employer fully recognizes that salts are protected by the Act, their testimony should be viewed skeptically when from the inception of their employment with Mardi Gras and this case they have been **completely** disingenuous. Ms. Nnaemeka and Mr. Walsh are irrefutably discredited by their own testimony. (See Tr. p. 45). There is no question that Ms. Nnaemeka and Mr. Walsh made intentional omissions on their resumes. (Tr. p. 435, 500). Both of these individuals continued their deception when they provided completely disingenuous affidavits to the NLRB and when they neglected to even advise the Board Attorney taking their affidavit that they were "salts." (Tr. p. 437, 500). Their sworn testimony provided to the Board in support of the unfair labor practices has to be viewed as totally incredible. Additionally, in their sworn affidavits to the NLRB in this case, Ms. Nnaemeka and Mr. Walsh intentionally omitted their educational level (Yale undergraduate, and a masters from Columbia, respectively), essentially lying to the NLRB. (Tr. p. 435, 500). Accordingly, their testimony should be disregarded as disingenuous and untruthful.

5. The ALJ Did Not Properly Analyze the Discharges under Wright Line

Under *Wright Line,* the General Counsel must first make a *prima facie* showing "sufficient to support the inference that protected conduct was a motivating factor in the employer's decision" to take the action which allegedly violated Section 8(a)(3) of the Act. *Wright Line,* 251 NLRB 1083, 1089 (1980). "Once this is established the burden

will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Id.* The Board has found that it is not necessary for a respondent to prove that the misconduct actually occurred in order to meet its burden under *Wright Line. Affiliated Foods,* 328 NLRB 1107, 1107 n. 1 (1999).

As is more fully explained below, the ALJ failed to look at key facts in determining that these employees were discharged in violation of Section 8(a)(3) of the Act. Among other key facts, the ALJ failed to consider whether the Employer, at the time the decision to terminate these employees was made, had a reasonable belief that the discharged employees had engaged in misconduct.

a. The ALJ Erred in Finding that Ms. Sochie Nnaemeka's Discharge Violated Section 8(a)(3) of the Act

The ALJ undoubtedly erred in finding that Respondent discharged Ms. Nnaemeka because of her union activity in violation of Section 8(a)(3) of the Act. (ALJD, p. 14, L. 8-9). The General Counsel by no means established that Respondent had any knowledge of Ms. Nnaemeka's alleged union activity, or further, that she was discharged because of any alleged union activity.[4] The ALJ improperly inferred and suggested that the statement, "he heard that I was getting myself into trouble," which Ms. Nnaemeka alleged was made by Nick Sanvil, Food and Beverage Supervisor, referred to Ms. Nnaemeka's alleged union activity. (ALJD, p. 12, L. 6-9). Even assuming, *arguendo,* that the Board established a *prima facie* case, Respondent rebutted General Counsel's *prima facie* case and demonstrated that Ms. Nnaemeka would still have been terminated absent any alleged union activity.

4 The ALJ noted that Respondent was not aware that Ms. Nnaemeka and Mr. Walsh were "salts" until the 10(j) proceeding in this matter, which was more than six (6) months after her discharge. (ALJD, p. 11, L. 48-49).

There is no question that the ALJ failed to consider all the facts surrounding the decision to terminate Ms. Nnaemeka. As mentioned above, at the outset the ALJ incorrectly credited Ms. Nnaemeka's testimony, which is the only evidence supporting the claim that she was discharged in violation of Section 8(a)(3) of the Act. Further, the ALJ ignored clear evidence which showed that Ms. Nnaemeka had an egregious attendance problem.[5] During her 59 days of employment, Ms. Nnaemeka was scheduled to work 23 days, and of those 23 days, she was tardy at least eight (8) times. (Tr. p. 497; Respondent's Ex. 13). The record clearly establishes that Ms. Nnaemeka had been verbally warned by her supervisor, Mr. Fodor, about her attendance problems. (*See* Tr. p. 678). In fact, there is irrefutable evidence that Mr. Fodor had commented on Ms. Nnaemeka's absenteeism in an email dated September 18, 2011, before Ms. Nnaemeka even claims to have engaged in any alleged union activity. (Tr. P. 679, Respondent's Ex. 14). Additionally, it is uncontroverted that Ms. Nnaemeka was informed, at the time of her discharge, that she was being discharged, in part, based on her "string of absences and tardies." (ALJD, p. 12, L. 16-18). The ALJ misplaced emphasis on whether or not Ms. Nnaemeka received documentation showing these absences during her termination meeting. (ALJD, p. 12, L. 38-46). The evidence clearly showed that Ms. Nnaemeka was advised that her termination was in part due to her horrendous attendance, which warranted her termination. Furthermore, the ALJ did not even take into account the fact that on October 17, 2011, Ms. Nnaemeka received a written discipline for not counting her bank. (Tr. p. 658-661).

The ALJ also incorrectly concluded that Ms. Nnaemeka's actions, when taking

5. Additionally, during her testimony, Ms. Nnaemeka reluctantly conceded that she also had an attendance problem at Calder, where she also worked on behalf of the Union as a salt. (Tr. p. 504).

her break, were proper, despite clear evidence to the contrary. (*See* ALJD, p. 13, L. 48-49). Jay Hassan, Assistant Director of the Food and Beverage Department, who had knowledge regarding the applicable rules and policies, testified that this was an improper place to take a break. (Tr. p 632). During Ms. Nnaemeka's termination meeting, she was informed that in addition to her attendance problem she was also being terminated because she took an unauthorized break. (Tr. p. 507). There is video surveillance documenting this misconduct.

In sum, Ms. Nnaemeka's egregious attendance problem, coupled with the unauthorized break, which all occurred during her probationary period, resulted in her termination from employment. There is no question that the ALJ failed to consider these key facts when evaluating her misconduct, resulting in an incomplete and incorrect finding that her discharge violated Section 8(a)(3) of the Act.

b. The ALJ Erred in Finding that James Walsh's Discharge Violated Section 8(a)(3) of the Act.

The ALJ erred in finding that James Walsh's discharge violated Section 8(a)(3) of the Act. General Counsel provided no evidence that the Employer had knowledge of Mr. Walsh's alleged union activity. Additionally, as mentioned above, the ALJ improperly credited Mr. Walsh's testimony. Assuming *arguendo*, that General Counsel can establish a *prima facie* case of an unlawful termination in violation of the Act, Respondent has irrefutably established that it would have terminated Mr. Walsh's employment absent any alleged union activity. Mr. Walsh, in his own testimony, conceded that he was working as a salt at Mardi Gras and was often running around during work hours away from his work area trying to organize for the Union instead of performing his bartender duties. (*See* Tr. p. 446-447).

It is uncontroverted that Mr. Walsh's repeated harassment of employees during work hours formed the basis of Respondent's decision to terminate his employment. In particular, two separate employees, Jacqueline Bello and Christina Forbes, complained to Mr. Hasan, Assistant Director of Food and Beverage, that Mr. Walsh was bothering them during work hours by asking them a number of questions. (Tr. p. 629-30). The ALJ incorrectly relates the complaints of these employees to the memorandum dated October 26, 2011, which asked employees to report stranger visits. (ALJD, p. 18, L. 3-5). While it is true that an employee may request certain information from fellow employees, it is a completely different matter to harass and bother fellow employees during work hours, after having been asked to stop. The complaints made by these two employees undermine the ALJ's conclusion that Mr. Hasan did not report that either employee claimed their work was interrupted. (*See* ALJD, p. 17, L. 28-29). Two separate employees would not have complained to management if Mr. Walsh's conduct was not interfering with their work and disrupting them. This behavior was unacceptable, especially for an employee that had been with the company fewer than 90 days. (Tr. p. 631). Ultimately, Mr. Walsh was terminated from employment while on probationary status for repeatedly interfering with the work of other employees, at least two of whom complained to management about his interfering with their work. Mr. Walsh admits that he repeatedly interfered with the work of other employees to promote the Union, despite being specifically instructed not to do so by the Union. (*See* Tr. p. 445).

The ALJ incorrectly concluded that General Counsel established a *prima facie* case, which Respondent did not rebut. General Counsel did not provide, and the ALJ's

Decision is void of, any indication that Respondent was aware of Mr. Walsh's alleged union activity. Further, Respondent's discharge of Mr. Walsh was warranted due to his continual harassment of his fellow employees during work hours resulting in complaints to management about his behavior. Respondent cannot be precluded from disciplining an employee who is repeatedly harassing fellow employees, and negatively affecting the work environment.

c. The ALJ Erred in Finding that Steven Wetstein's Discharge Violated Section 8(a)(3) of the Act

The ALJ incorrectly concluded that Steven Wetstein was discharged in violation of Section 8(a)(3). Specifically, the ALJ ignored that at the time of his termination, Mr. Wetstein was on final warning for "double dipping" [6] a very serious offense for which he could have been terminated for regardless.

The ALJ failed to take into account that Mr. Wetstein had been employed with Respondent less than a year and was on a final warning for a critical violation of Respondent's policy at the time he engaged in the misconduct that ultimately resulted in his termination on November 23, 2011. (*See* Tr. p. 88–89). Further, the ALJ improperly refers to unsubstantiated questions from Chef Wally to Mr. Wetstein, regarding how a union works. The ALJ also improperly refers to alleged unsupported comments by Mr. Adkins regarding the Union, in his findings regarding Mr. Wetstein's termination. (ALJD, p. 20, L. 50-51; p. 21, L. 1-7). Aside from Mr. Wetstein's contrived statements, there was no testimony presented to support these statements.

On November 23, 2011, Mr. Hasan was in his office when Terrell Blow, a food

6 Double dipping is using the same spoon to taste the soup over and over after having placed it in your mouth. (Tr. p. 628).

porter, came to his office visibly upset, asking to speak with Mr. Hasan. (Tr. p. 627). Mr. Blow came in and complained to Mr. Hasan that Mr. Wetstein "approached him, asking him for his cell number, his home address, and to meet with him outside to talk about whatever organization he was talking about and to meet with him outside, and he was bothered by it." (ALJD, p. 21, L. 22-24; *see also* Tr. p. 627).[7] Mr. Blow advised Mr. Wetstein that he was not interested, but Mr. Wetstein persisted and continued asking him questions interfering with Mr. Blow's work. (Tr. p. 286, 628). The ALJ incorrectly relies on Mr. Wetstein's statements that he did not interfere with Mr. Blow's work, yet Mr. Blow's complaint establishes the opposite. (ALJD, p. 21, L. 51; p. 22, L. 44-45). Thereafter, Mr. Hasan asked Mr. Blow to write down his complaint. (Tr. p. 627).[8] Obviously Mr. Blow would not have complained if he did not feel Mr. Wetstein was bothering him. Mr. Blow prepared his statement with the administrative assistant, Ms. Victoria, and she then provided the statement to Steven Feinberg, Director of Human Resources. (Tr. p. 647).

As mentioned above, Mr. Wetstein was on final warning at the time the incident with Mr. Blow occurred. (Tr. p. 628). In fact, Mr. Hasan had previously recommended that Mr. Wetstein's employment be terminated after he was twice caught "double dipping" which was a serious sanitary violation of Respondent's policy and one which Respondent had zero tolerance for. (Tr. p. 628). This recommendation by Mr. Hasan was made in July 2011, predating any alleged union activity at Mardi Gras. Since Mr. Wetstein was on a final warning, any incident thereafter would result in termination. (Tr.

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7. Mr. Wetstein's work assignment is on the third floor; however, he left his assigned work area and was questioning Mr. Blow down on the first floor. (Tr. p. 627).
8. As a supervisor, when an employee complains about a problem at work, it is the supervisor's responsibility to ask the employee to provide a statement about the incident. (Tr. p. 647).

p. 628, 642).

As noted by the ALJ, Mr. Wetstein's discharge document only references the incident with Mr. Blow where he was "disrupting the workplace by interfering with another employee's ability to work," but does not refer to his prior incident of double dipping. (ALJD, p. 22, L. 19-22). Respondent's testimony, however, showed that it was Company policy and practice not to document the prior discipline on the termination documents, but only the last incident. (Tr. p. 642). Thus, any reliance that the ALJ placed on the absence of this information on Mr. Wetstein's termination discharge document is misplaced. It was unrefuted at the hearing that Mr. Wetstein was on final warning.

Therefore, while Mr. Wetstein's termination document only reflects that he was terminated for "disrupting the workplace", the testimony was clear that his final warning was considered in making the decision to terminate him. (Tr. p. 642; *see also* General Counsel's Ex. 43). Since Mr. Wetstein was on a final warning because of the "double dipping" incidents, the incident with Mr. Blow was analogous to strike three, and resulted in his termination. (Tr. p. 648). There is no question that Mr. Wetstein's termination was warranted given the length of his employment, and his having been on final warning already when the incident occurred on November 23, 2011. Accordingly, the ALJ erred in finding that his discharge violated Section 8(a)(3) of the Act.

d. The ALJ Erred in Finding that Employer Violated Section 8(a)(1) and (3) by Discharging Dianese Jean and Alicia Bradley; and by Suspending and Discharging Theresa Daniels-Muse, Tashana McKenzie and Amanda Hill

The ALJ ignored key facts regarding the "delegation" by the employees on November 17 and 18, 2011, which undermine his finding that these employees were

discharged, and some suspended, in violation of Section 8(a)(3) of the Act. Namely, the ALJ failed to consider the disruption caused by this delegation, that the delegation violated the MOA, and that the delegation violated company policy. The evidence established that the Union knowingly orchestrated the termination of Alicia Bradley (Player's Club Representative), Amanda Hill (Money Sweeper), Dianese Jean (Cage Cashier), Theresa Muse-Daniels (Floor Attendant), and Tashana McKenzie (Floor Attendant), by organizing a demonstration that disrupted Respondent's work place, interfered with Respondent's customers and on duty employees, and violated Respondent's policy. Accordingly, Ms. Bradley, Ms. Hill, Ms. Jean, Ms. McKenzie, and Ms. Daniels-Muse were discharged as a result of their admitted conduct -- coming onto the public areas of the Respondent's property with a large group resulting in the disruption of the casino's operations and violating Respondent's policy and the MOA. (*See* Tr. p. 761-762).

On November 17, 2011, at about 11:00 A.M., a large group of people, including the five above referenced employees, former employees, non-employees, and Union representatives, surged onto Respondent's property. (Tr. p. 161, 753). This large group stormed in through the main entrance and approached the reception desk, and as seen in the surveillance video, effectively blocked the entire entry way to the casino. (Tr. p. 753; *see* Respondent's Ex. 46). Mike Hill, lead Union organizer, who was part of this group of individuals, informed the receptionist that the group wanted to meet with Dan Adkins. (*Id.*). As noted by the ALJ, multiple customers had to walk through or around the delegation. (ALJD p. 23 L. 33-35). The ALJ improperly downplayed the disruption and impediment of access caused by this delegation. (*See* ALJD p. 23, L. 35) (Tr. p.

753). Further, the surveillance video from that day shows a gentleman with white hair who was effectively shoved aside by Mr. Hill, as Mr. Hill approached the reception desk, coming between the gentleman and a woman customer. (Tr. p. 759, 778; *see* Respondent's Ex. 40 & 46). Although lead organizer Mike Hill claimed that the purpose of his visit was to introduce the Union to Mr. Adkins, and "hopefully sit down and talk" his actions with the group contradict this assertion. (*See* ALJD p. 23, L. 18-20).[9]

Belying the Board's allegations that the Respondent sought to terminate these employees because of their union activity, Respondent took steps seeking to avoid further disruptive and improper conduct by advising the Union not to engage in these types of disruptive actions and further counseling that employees "engaging in these actions during working hours and on the premises will be terminated immediately." (Tr. P. 762; Respondent's Ex. 27). Rather than electing to abide by the Neutrality Agreement and the Respondent's clear warning, the Union, apparently seeking confrontation at this point, chose to engage in the same disruptive practice on the very next day. (Tr. p. 170).

Again, on November 18, Mr. Hill and a large group of individuals similarly approached the reception desk. (Tr. p. 760). Once again, Mr. Hill and the group were asked to leave or else security would call the police. (Tr. p. 178). Mr. Hill responded "[c]all the police." (Tr. p. 178). It was only after the police came and informed the group that they were trespassing, and that they were going to issue citations, that these individuals left the premises. (*See* Tr. p. 178).

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9. Mr. Hill could have called Mr. Adkins, if his intent was truly to announce the Committee to Mr. Adkins and seek access to non-public areas pursuant to the MOA. (See Tr. P. 170). Yet, Mr. Hill, as lead organizer, never called Mr. Adkins to request access to the facility. (Tr. P. 170-71).

The incidents on November 17 and 18, sparked Respondent's concerns that it may be confronted with disruption of a greater scale in the future. (Tr. p. 767-68).[10] Accordingly, it was only after the Union and the employees ignored Mr. Adkins clear warnings and returned to the property on November 18, 2011, that Respondent decided to discharge the employees that engaged in this improper conduct including, Bradley, Hill, Jean, McKenzie and Daniels-Muse. (Tr. p. 762). While some of the aforementioned employees did not return on the eighteenth (18th), the decision was made to terminate all five (5) employees because all of them had engaged in disruptive behavior, which violated a clear policy in an intentional manner. (Tr. p. 78, 149, 762-63).

The ALJ did not take into account that this group's conduct was a blatant violation of the MOA. (*See* Tr. p. 753). The MOA or Neutrality Agreement[11] provides in relevant part:

> If the Union provides written notice to the Employer of its intent to organize Employees covered by this Agreement, the Employer shall provide access to its premises and to such Employees by the Union. The Union may engage in organizing efforts in non-public areas of the gaming facility during Employees' non-working times (before work, after work, and during meals and breaks) and/or during such other periods as the parties may mutually agree upon. Union representatives will be required to sign in and wear identification while on the premises of the Employer. The Union will not disrupt or interfere with normal work business and operations of the Employer or its employees.

(Tr. p. 757; General Counsel's Ex. 13, Section 7) (emphasis added).

10. Subsequently, in May of 2012, 300 people, including employees, rallied together in an act of Civil Disobedience on Federal Highway outside the casino. (Tr. p. 768-69). Significantly, no action was taken against any of the employees who participated in this demonstration, as they did not come onto the property or violate Respondent's policy. (Tr. p. 769-770).

11 . Respondent asserts that this Agreement expired on October 24, 2011. However, the Union has argued that it expired on December 31, 2011. Respondent will accept the Union's position for the purpose of this Brief. Thus, the Union was operating under the assumption that the MOA was still in effect when they stormed Mardi Gras on November 17, 2011 and November 18, 2011 in clear violation of its terms, which manifestly demonstrates the Union's bad faith. (Tr. p. 754).

Mr. Hill conceded that he and the group assembled in a very public place within the casino. (Tr. p. 169). Additionally, Mr. Hill, a Union representative, was not wearing identification on November 17 and 18, as required by the MOA. (Tr. p. 169). Moreover, from the effective date of the MOA in 2006, the Union never requested access to a meeting room, break room, or any other non-public area to access employees. (Tr. p. 755).[12] The agreement does not refer to any meeting with management, it only refers to the right to come to the facility and meet with employees. (Tr. p. 756).

Further, the ALJ ignored the clear policy violated by these employees when they stormed the casino on November 17 and 18. Specifically, they violated the "Employee Visitation to Company While Off-Duty Policy", which in pertinent part provides:

> 2. ...If an employee is in a group of individuals that are not Mardi Gras employees and are not acting in accordance to the Mardi Gras standards or are not obeying House Rules the employee conduct through association may be subject to disciplinary action up to and including termination.

(Tr. p. 761-62; General Counsel's Ex. 15, p. 55). The change of status forms for all five (5) employees states the reason for termination as "violating company work rules." (*See* ALJD, p. 25, L. 38-39). There is no requirement that Respondent include in the change of status forms the specific policy for which the employee is being terminated; accordingly, any inference drawn by the ALJ because the specific rule was not cited is improper. (*See* ALJD, p. 25, L. 39). Rules, such as this one, are necessary and

12. Although, Wendi Walsh wrote to Mr. Adkins on November 2, 2011, requesting a meeting with him, this meeting with management was not provided for in the MOA and was rejected. (Tr. p. 777). Importantly, the agreement does not reference or provide for a meeting with management; it simply provides the ability to access non-public areas after following proper procedures. (Tr. p. 755; General Counsel's Ex. 13).

essential to Respondent's gaming environment. (Tr. p. 762). Given the nature of the business, strict compliance with Respondent's rules and regulations is required. (Tr. p. 765). Respondent's requirement of strict compliance with its rules and regulations results in a number of annual for-cause terminations. (Tr. p. 765). In 2011, there were 75 such involuntary discharges. (Tr. p. 765).

Moreover, the group showed up on November 17 and 18, admittedly knowing that they did not have an appointment with Mr. Adkins. (Tr. p. 350, 407). These employees were familiar with Mr. Adkins and they knew how to go about making an appointment to see him. (Tr. p. 351). Yet, these employees did not make any effort to arrange an appointment with Mr. Adkins before November 17 or 18. Significantly, these employees came onto the property on November 17 and 18, having been warned that their actions may lead to termination. (Tr. p. 175). In fact, some of these employees even emptied out their lockers before being terminated because they knew the consequences of their actions. (Tr. p. 245, 257, 344). Additionally, in a meeting with Mr. Adkins to discuss the grounds for her termination, Ms. Hill conceded that Lead Organizer Mike Hill, had told her that by coming to the facility, she could be terminated. (Tr. p. 763).[13]

While the General Counsel contends that Respondent sought to discharge the members of the Employee Union Organizing Committee, employees that were on the committee, who did not engage in this misconduct, were not terminated and remain employed to this day. (*See*, e.g. Tr. P. 128, 297). Further, the committee had more members than those shown on the flyer and there is no evidence of any adverse

13. On or about December 2, 2011, Ms. Hill scheduled an appointment to speak with Mr. Adkins about her termination, and she had no problem obtaining an appointment to speak with Mr. Adkins. (Tr. p. 401).

employment action against these employees.[14] (*See* Tr. p. 164). Thus, it is clear that these employees were terminated for their disruptive behavior, which was a flagrant violation of Respondent's policy and the MOA, and not because of union activity.

6. The ALJ's Remedies are Incorrect

a. Reinstatement is Not the Proper Remedy

The ALJ failed to consider the misconduct by the discharged employees and improperly ordered their reinstatement. There is no question that the discharged employees, who are the subject of this matter, were terminated for cause and would have been terminated even if they did not engage in any union activity. This very type of scenario is addressed in Section 10(c) of the Act. *See* 29 U.S.C. § 160(c). Specifically, Section 10(c) of the Act states, in relevant part, that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." (*Id.*). In *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964), the Supreme Court found that the legislative history of the statute [29 U.S.C. § 160(c)] indicated that its purpose was to preclude the Board from reinstating an individual who had been discharged because of misconduct. This Supreme Court holding has since been consistently adhered to by the Board.

With respect to, Sochie Nnaemeka, Alicia Bradley, Amanda Hill, Theresa Muse-Daniels, Tashana McKenzie, and Dianese Jean, there is clear video evidence that irrefutably establishes they violated Company Policy. (*See* Tr. p. 507; Respondent's Ex. 40 &41). This factual scenario is similar to that in *Anheuser-Busch, Inc.,* 351 NLRB 644

14. In fact, according to Mr. Hill, there were 20 employees on the committee. (Tr. p. 164).

(2007) *review denied sub nom. Brewers and Malsters, Local Union No. 6 v. NLRB,* 303 Fed. Appx. 899 (DCC 2008), where the Board held that employees who were caught through the use of cameras engaging in misconduct, and as a result disciplined or discharged, were terminated "for cause" within the meaning of Section 10(c), and, therefore, the Board lacked authority to order reinstatement. The Board noted that "[t]his meaning of the phrase 'for cause' does not include an inquiry into the source of the employer's knowledge of the misconduct." *Id.* at 647. Further, the Board in *Anheuser-Busch,* stated "[w]e find particularly compelling the policy consideration that employees who engage in misconduct, and who receive the appropriate discipline for that misconduct, should not benefit from their misconduct through a windfall award of reinstatement and backpay." *Id.* at 649.

The Board's holding in *Anheuser-Busch,* is equally applicable to the terminations of, Steven Wetstein, and James Walsh. For instance, Mr. Wetstein was on a final warning for "double dipping" when he interfered with the work on another employee, and should have been terminated for that critical infraction. In addition, Mr. Walsh was irrefutably neglecting his bartender responsibilities and harassing other employees during work hours. Furthermore, the House Conference Report notes that under §10(c):

> employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules.... Will not be entitled to reinstatement.

H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 55 (1947), *quoted in Fibreboard Paper Products,* 379 U.S. at 217 n. 11; *Anheuser-Busch,* at 648. The employees in this

matter were terminated "for cause" pursuant to Section 10(c), and, therefore, should not be reinstated.

b. After-Acquired Evidence of Misconduct

Even assuming, *arguendo*, that Ms. Nnaemeka and Mr. Walsh were unlawfully discharged, they are further precluded from seeking reinstatement or full back pay on the basis of after-acquired evidence of misconduct. During the course of the litigation, Employer learned that Mr. Walsh and Ms. Nnaemeka lied on their employment application. This is a blatant violation of company policy for which they would have been terminated upon discovery. Thus, even absent alleged Union activity, this misconduct would have led to the termination of Mr. Walsh and Ms. Nnaemeka at the time that it was discovered, and therefore, reinstatement at this time is improper.

Specifically, Section 206 of the Employee Handbook states:

> The Company relies upon the accuracy of information contained in the employment application, as well as the accuracy of other data presented throughout the hiring process and employment. Any misrepresentations, falsifications, or material omissions in any of this information or data may result in discipline, up to and including the exclusion of the individual from further consideration of employment or immediate discharge.

(General Counsel's Ex. 15, p. 18).

In *John Cuneo, Inc.*, 298 NLRB 856 (1990), the Board held that if any employer shows that an employee engaged in misconduct for which it would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date that it first learned of the misconduct. Further, in *First Transit, Inc.*, 350 NLRB 825, 828-830 (2007), the Board applied *John Cuneo, Inc.*, to a similar factual scenario where the Employer learned at the hearing that an employee had lied on his employment

application.

Even absent any alleged protected activity, pursuant to Respondent's policy, falsifying an employment application is a terminable offense in and of itself. (*See* General Counsel's Ex. 15). Thus, there is no doubt that even assuming that it is found that Mr. Walsh and Ms. Nnaemeka were discharged unlawfully, they should be precluded from reinstatement, and any award of back pay should be limited to the time that the misconduct was discovered during the preparation for the 10(j) proceeding in this case.

7. Conclusion

Based on the foregoing Respondent respectfully requests that the Board reverse the Administrative Law Judge on the issues discussed above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail, on this 3rd day of November, upon:

Susy Kucera, Esquire,
National Labor Relations Board, Region 12,
Miami Resident Office,
51 Southwest 1st Avenue, Suite 1320,
Miami, Florida 33130;

Mike Hill, Organizer,
United Here Local 355,
1525 NW 167 Street, Ste. 450,
Miami Fl. 33169-5236

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-60978-MC-ZLOCH

MARGARET J. DIAZ, Regional Director of The Twelfth Region of The NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

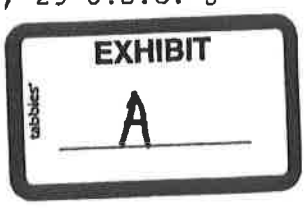
HARTMAN AND TYNER, INC. d/b/a MARDI GRAS CASINO and HOLLYWOOD CONCESSIONS, INC.,

Respondent.
_____/

ORDER

THIS MATTER is before the Court upon Petitioner Margaret J. Diaz's Amended Petition For Preliminary Injunction Under Section 10(j) Of The National Labor Relations Act, As Amended (DE 31) and the testimony and evidence presented at the evidentiary hearing on the Amended Petition held by the Court on June 18, 2012, and June 19, 2012. The Court has carefully reviewed the entire court file herein and is otherwise fully advised in the premises.

By the filing of the instant Amended Petition (DE 31), Petitioner Margaret J. Diaz, Regional Director of the Twelfth Region of the National Labor Relations Board (hereinafter "the Board"), moves the Court for preliminary injunctive relief pursuant to section 10(j) of the National Labor Relations Act, 29 U.S.C. §



160(j) (hereinafter "the Act"). She moves for this temporary injunctive relief pending the final disposition of matters pending before the Board on a consolidated Complaint issued by the Acting General Counsel of the Board on April 30, 2012. Said Complaint alleges that Respondent Hartman & Tyner, Inc. d/b/a Mardi Gras Casino and Hollywood Concessions, Inc. has engaged in acts and conduct in violation of sections 8(a)(1) and (3) of the National Labor Relations Act. See 29 U.S.C. §§ 158(a)(1), 158(a)(3).[1] On June 18, 2012, and June 19, 2012, the Court held an evidentiary hearing on the Board's Amended Petition (DE 31).

Indeed, section 10(j) of the National Labor Relations Act gives the Board the power, upon issuance of a complaint charging that a person has engaged in or is engaging in an unfair labor practice, to petition the district court for appropriate temporary relief or a restraining order. The Act provides, in pertinent part:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an

[1] These provisions of the Act make it an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of the[ir collective bargaining] rights" or to discourage union membership "by discrimination in regard to hire or tenure of employment or any term or condition of employment." 29 U.S.C. §§ 158(a)(1), 158(a)(3).

> unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C. § 160(j). Interim injunctive relief is "sometimes necessary in order to preserve the Board's remedial power," as the underlying administrative process often "moves slowly." Arlook v. Lichtenberg & Co., Inc., 952 F.2d 367, 369 (11th Cir. 1992). In Lichtenberg, the Eleventh Circuit clarified the standards governing injunctive relief pursued under section 10(j), explaining that a district court should grant the Board's request for section 10(j) equitable relief only when the following two conditions are satisfied: (1) there is reasonable cause to believe that the alleged unfair labor practices have occurred, and (2) the requested injunctive relief is "just and proper." Id. at 371.

On or about January 11, 2012, labor union UNITE HERE Local 355 filed nine charges with the National Labor Relations Board alleging that Respondent had engaged in, and was continuing to engage in, unfair labor practices in violation of the National Labor Relations

Act. Some of those charges were later amended on March 8, 2012. On April 30, 2012, the Acting General Counsel of the Board issued an Order Consolidating Cases, a Consolidated Complaint, and a Notice of Hearing. The initial Petition (DE 1) in the above-styled cause was filed in this Court on May 22, 2012. The Court set the matter for an evidentiary hearing, beginning June 18, 2012. See DE 9. Petitioner then filed a Motion For Leave To Amend (DE 22) her Petition, which the Court granted. See DE 23. A hearing before an administrative law judge on the allegations contained in the Consolidated Complaint was scheduled to begin on June 25, 2012. See DE 31.

In her Amended Petition (DE 31), Petitioner Diaz lists a myriad of ways in which Respondent has allegedly violated and continues to violate sections 8(a)(1) and (3) of the National Labor Relations Act. At the evidentiary hearing, she presented testimony and evidence supporting only some of these allegations. At the heart of the Amended Petition (DE 31) and of Petitioner's presentation of testimony and evidence at the evidentiary hearing are Respondent's terminations of six employees, allegedly in retaliation for their participation in union activity. All of these terminations took place between November 18, 2011, and

November 23, 2011. In addition to an injunction enjoining Respondent from continuing to engage in the alleged unfair labor practices, Petitioner asks the Court to order that the discharged employees be immediately reinstated to their former positions. According to Petitioner, interim reinstatement of these employees is necessary in order to reduce the likelihood of irreparable harm to the remaining employees' rights under the Act.

Reasonable Cause

The Court must first determine whether the Board has reasonable cause to believe that the alleged labor violations have occurred. This inquiry is "limited to evaluating whether the Board's 'theories of law and fact are not insubstantial and frivolous.'" Lichtenberg, 952 F.3d at 371 (quoting Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1189 (5th Cir. 1975)).[2] In order to establish "reasonable cause," Petitioner must present a substantial, nonfrivolous, coherent legal theory of the labor violations, and then come forward with enough evidence in support of her legal theory to permit a rational factfinder, considering

[2] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

the evidence in the light most favorable to the Board, to rule in favor of the Board. Id. The Court is not charged with weighing all of the evidence presented at the evidentiary hearing in an effort to decide whether "in fact" a labor violation has occurred. Id. at 372. Rather, the Court must limit its inquiry to whether the evidence presented here might permit a rational factfinder to "eventually rule in favor of the Board." Id. at 373.

Just and Proper

The Court must also evaluate whether the injunctive relief requested by Petitioner is "just and proper." Injunctive relief under section 10(j) is considered "just and proper" whenever the facts demonstrate to the court that, without such relief, "any final order of the Board will be meaningless or so devoid of force that the remedial purposes of the [NLRA] will be frustrated." Id. (quoting Pilot Freight, 515 F.2d at 1192). This second prong of the section 10(j) analysis confers discretion upon the district court, allowing it to provide "such temporary relief or restraining order as [the district court] deems just and proper." 29 U.S.C. § 160(j); Pilot Freight, 515 F.2d at 1192. In Lichtenberg, the Eleventh Circuit expressly declined to delineate an entire list of

factors requisite to the "just and proper" determination. It did, however, state factors that have been used by other courts in finding injunctive relief "just and proper." Those factors included: 1) "when organizational efforts are highly susceptible to being extinguished by unfair labor practices;" 2) "when unions and employees have already suffered substantial damage from probable labor violations;" and 3) "when the violations reasonably found to have been committed will be repeated absent an injunction." Lichtenberg, 952 F.2d at 372 (citations omitted).

Discussion

In her Amended Petition (DE 31), the Court is satisfied that Petitioner has set forth "a substantial, nonfrivolous, coherent legal theory of [a] labor violation." Lichtenberg, 952 F.3d at 371 (citing Boire v. Int'l Bhd. of Teamsters, 479 F.2d 778, 792 (5th Cir. 1973). In making this finding, the Court notes that the standard here, requiring a demonstration of coherence that surpasses insubstantiality and frivolity, is not an onerous or heavy one. Having determined that a substantial, nonfrivolous, coherent legal theory exists, the Court must now determine whether Petitioner has presented sufficient evidence to permit a rational

factfinder to rule in favor of the Board. Lichtenberg, 952 F.2d at 371-72. Taking the facts in the light most favorable to the Board, as it must, the Court finds that there is enough evidence, albeit marginally so, to support the Board's legal theory and permit a rational factfinder to find in its favor. Thus, the Court finds that Petitioner has demonstrated that the Board has reasonable cause to believe that Respondent has violated sections 8(a)(1) and (3) of the Act. Notwithstanding this finding, the Court offers no opinion as to the ultimate outcome of the proceeding currently before the Board.

Having found that the Board has reasonable cause to believe that the alleged unfair labor practices have occurred, the Court now turns to evaluate whether the requested injunctive relief is "just and proper." Here, the Board seeks essentially two forms of relief: 1) an injunction enjoining Respondent from engaging in any conduct in violation of the Act; and 2) a mandate requiring affirmative acts on the part of the Respondent, including its reinstatement of the six employees who were allegedly terminated for their union activity during the month of November, 2011.

The Court's role here is a narrow and limited one: to provide "appropriate temporary relief." 29 U.S.C. § 160(j) (emphasis

added). If, in its discretion, the Court "does not believe that far-reaching mandatory relief would serve the purposes of the Act," it need not grant the full remedy requested by the Board. Petitioner first asks the Court to enter an injunction enjoining Respondent from engaging in unfair labor practices. The Court is satisfied that this type of interim injunctive relief is "just and proper" here. Accordingly, pending final determination of the charges before the Board, the Court will prohibit Respondent from engaging in conduct constituting unfair labor practices.

In addition to asking the Court to enjoin Respondent from engaging in unfair labor practices, Petitioner also asks the Court to order mandatory injunctive relief, requiring affirmative acts on the part of the Respondent, including the interim reinstatement of the six employees she alleges were unlawfully terminated by Respondent during November of 2011. The Court recognizes the particular potential of mandatory remedies to usurp the Board's powers and prerogatives. Pilot Freight, 515 F.2d at 1192. These measures, which act to short-circuit the Board's processes, are to be "sparingly employed." Id. The Court is also mindful that reinstatement of allegedly unlawfully discharged employees is an extraordinary remedy "generally left to the administrative

expertise of the Board." Id. Further, the Court recognizes that "[a]lthough the time span between commission of the alleged unfair labor practices and filing for § 10(j) sanctions is not determinative of whether relief should be granted, it is some evidence that the detrimental effects of the discharges have already taken their toll on the organizational drive." Id. at 1193. (affirming district court's decision declining to reinstate discharged employees where Board waited three months before filing its section 10(j) petition). See also Overstreet v. El Paso Elec. Co., 176 F. App'x 607, 610-11 (5th Cir. 2006)(affirming district court's refusal to order reinstatement in light of its determination that any detrimental effect resulting from discharge had been fully realized during the seven-month delay in raising the issue).

The Union brought these six terminations to the attention of the Board on January 11, 2012. The Board then waited more than four months before petitioning the Court for injunctive relief. The above-styled cause was then filed on May 22, 2012, a date more than six months after all of the terminations at issue. At this point, it is highly questionable "whether an order of reinstatement would be any more effective than a final Board order." Pilot

Freight, 515 F.2d at 1193. In her Amended Petition (DE 31), Petitioner states that "[u]nless [interim reinstatement] is granted, it may be fairly anticipated that any support for the Union among the remaining employees will inevitably erode over time." But, after considering the testimony and evidence presented at the evidentiary hearing, the Court is simply not convinced that there remains a lingering threat of additional, unrealized harm flowing from the discharges which would warrant this type of extraordinary injunctive relief.

The testimony and evidence presented at the evidentiary hearing indicated that the Union's drive to organize had grown cold more than a week prior to any of the alleged retaliatory discharges. See Respondent's Ex. 35.[3] Each of the six employees at issue was discharged after the Union had been otherwise unable to successfully organize, apparently due to a pre-existing reluctance on the part of the employees to participate.[4] Thus, the

[3] This Summary reflects that between November 1, 2011, and November 10, 2011, the Union obtained eighty (80) signed authorization cards. But in the week prior to November 18, 2011 (the date of the first discharge, the Union was able to obtain only four (4) signed authorization cards. In the week following November 18, 2011, the Union was able to obtain three (3) signed authorization cards.

[4] Mr. Steven Wetstein testified that in the time prior to his termination, he made between 40 and 60 home visits to employees, and obtained only 5 signed authorization cards. DE 28, pp. 98-99.

Court is altogether unconvinced that the interim reinstatement of the six discharged employees would materially affect employee support for the Union or the Union's ability to organize. Further, any erosion in Union support resulting from the six allegedly retaliatory discharges, if it existed at all, has undoubtedly been fully realized at this point—more than six months later. See El Paso Elec. Co., 176 F. App'x at 610-11.

Therefore, for the reasons previously stated, the Court does not find that it would be "just and proper" for it to take the extraordinary step of ordering the interim reinstatement of the six discharged employees. The Court is satisfied that their cause can be effectively prosecuted before the Board. See Pilot Freight, 515 F.2d at 1193 ("Whether these employees were in fact dismissed for their organizational efforts will be determined by the Board when it brings the full panoply of its resources to bear upon issuance of the final order.").

Petitioner further requests that the Court require Respondent to provide the Union with an alphabetized list of the full names and home addresses of all current food and beverage employees,

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Ms. Tashana McKenzie testified that she contacted approximately 20 to 30 employees, obtained no signed authorization cards prior to her termination, and just one (1) signed authorization card after her termination. DE 32, pp. 22-23.

gaming employees, and housekeeping employees at its facility. The Court will so order. However, the Court declines to order any of the other mandatory injunctive relief requested in the Amended Petition (DE 31), including ordering Respondent to provide the Union with certain access to bulletin boards at the Respondent's facility so that it may post documents, and requiring translations, posting, and a public reading of the Court's Order at the Respondent's expense.

The Court will, however, as stated above, prohibit Respondent from committing any unfair labor practices in futuro, pending final determination of the charges before the Board.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED that Petitioner Margaret J. Diaz's Amended Petition For Preliminary Injunction Under Section 10(j) Of The National Labor Relations Act, As Amended (DE 31) be and the same is hereby **GRANTED** in part and **DENIED** in part as follows:

1. Respondent, its officers, agents, successors, and assigns, and all persons acting in concert with or participation with them, pending the final disposition of the matters involved herein before the Board, be and the same are hereby **ENJOINED** and **RESTRAINED** from engaging in the following acts and conduct:

(a) Creating an impression among its employees that their union activities and protected concerted activities are under surveillance by Respondent;

(b) Asking employees to report the union activities and protected concerted activities of other employees to Respondent;

(c) Interrogating employees about their union membership, activities, and sympathies and about the union membership, activities, and sympathies of other employees;

(d) Threatening employees with discharge, arrest, or unspecified reprisals if they engage in union activities or protected concerted activities, or because they have engaged in union or protected concerted activities;

(e) Impliedly promising benefits to employees if they refrain from engaging in union activities and protected concerted activities;

(f) Promising employees a wage increase in order to induce them to abandon their activities on behalf of the Union;

(g) Discharging, suspending, or otherwise discriminating against employees because they join or assist the Union or engage in concerted activities, or in order to discourage employees from engaging in these activities;

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act;

2. By noon on Friday, July 6, 2012, Respondent shall provide the Union with an alphabetized list of the full names and home addresses of all current food and beverage employees, gaming employees, and housekeeping employees at its facility;

3. In all other respects, Petitioner Margaret J. Diaz's Amended Petition For Preliminary Injunction Under Section 10(j) Of The National Labor Relations Act, As Amended (DE 31) be and the same is hereby **DENIED** consistent with the terms of this Order; and

4. To the extent not otherwise disposed of herein, all pending Motions be and the same are hereby **DENIED** as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 29th day of June, 2012.

William J. Zloch

WILLIAM J. ZLOCH
United States District Judge

Copies furnished:
All Counsel of Record

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Record Excerpts was served by overnight mail on counsel at the addresses listed below:

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/s/ Richard J. Lussier
Richard J. Lussier
Senior Attorney
National Labor Relations Board

Dated at Washington, D.C.
this 10th day of October 2012